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**JAN 24 2007**

**OFFICE OF PETITIONS**

In re Application of  
Michael Magers, et al.  
Application No. 10/729,526  
Filed: December 5, 2003  
Attorney Docket No. 055003

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**ON PETITION**

This is a decision on the petition, filed September 26, 2006, to revive the above-identified application under the provisions of 37 CFR 1.137(b).

The petition to revive under 37 CFR 1.137(b) is **GRANTED**.

The application became abandoned for failure to pay the issue fee on or before July 7, 2005. A Notice of Abandonment was mailed on September 26, 2005. On September 26, 2006, the present petition was filed.

It is noted that applicants contend that the Notice of Allowance mailed April 7, 2004 was not received. Applicants state that a search of the file jacket and docket records indicates that the Notice of Allowance was not received. In support thereof applicants submitted the docket record for the above-identified application.

The evidence presented by applicants is insufficient to withdraw the holding of abandonment. An allegation that the Office communication was not received must be overcome by a showing that it was not received.

The showing required to establish non-receipt of an Office communication must include all of the following requirements:

- (1) A statement from the practitioner stating the Office communication was not received by the practitioner;
- (2) A statement attesting to the fact that a search of the file jack and docket records indicates that the Office communication was not received; and
- (3) A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.

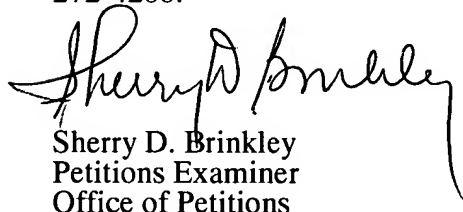
The docket record indicated above must also include a copy of the **list** of all responses in the practitioner's office with the due date of July 7, 2005. See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993). The petition has failed to comply with requirement (3) indicated above. Accordingly, the request to withdraw the holding of abandonment cannot be granted.

A grantable petition under 37 CFR 1.137(b)<sup>1</sup> must be accompanied by: (1) the required reply,<sup>2</sup> unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The petition is found to comply with the requirements of 37 CFR 1.137(b). Accordingly, the petition is granted.

The petition satisfies the requirements of 37 CFR 1.137(b) in that petitioner has supplied (1) the reply in the form of the requisite issue/publication fee; (2) the petition fee of \$750; and (3) an adequate statement of unintentional delay<sup>3</sup>.

The application is being referred to the Office of Publications to be processed into a patent.

Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3204. Telephone inquiries related to processing at Publishing Division should be directed to (571) 272-4200.



Sherry D. Brinkley  
Petitions Examiner  
Office of Petitions

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<sup>1</sup> As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

<sup>2</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

<sup>3</sup> 37 CFR 1.137(b)(3) requires a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. Although the statement contained in the petition varies from the language required by 37 CFR 1.137(b)(3), the statement will be construed as the statement required by 37 CFR 1.137(b)(3). Petitioner must notify the Office if this is not a correct interpretation of the statement contained in the instant petition.